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**FERRELLGAS COMMENTS ON REVISIONS TO
INCIDENT REPORTING REQUIREMENTS AND DOT
HAZARDOUS MATERIAL INCIDENT REPORT FORM**

Ferrellgas is pleased to provide comment on the above-referenced Advance Notice of Proposed Rulemaking (ANPRM). Ferrellgas is the second largest propane marketer in the United States, and transports propane by cargo tank motor vehicles in more than 40 states across the nation. Ferrellgas is accordingly subject to the incident reporting requirements of 49 C.F.R. §§ 17.1.15 and 17.1.16, and will be affected directly by any decision to amend or not to amend those provisions. Accordingly, Ferrellgas has a keen interest in the subject of the ANPRM.

General Comments

A. RSPA Should Reduce Rather than Increase Reporting Burdens Imposed on the Propane Industry.

1. RSPA has the Authority to Reduce Regulatory Burdens and has A MANDATE TO DO SO.

On March 4, 1995 President Clinton directed all Federal agencies to conduct a review of their regulations and to revise or eliminate requirements in need of **reform**. The President emphasized, in particular, that reform consistent with the principles enunciated in Executive Order No. 12866 “must be a top priority”. Memorandum from President William J. Clinton Heads of Departments and Agencies (March 4, 1995). A core principle of regulation enunciated in Executive Order No. 12866 is that regulations should be tailored “to impose the least burden on society, including individuals, businesses of differing sizes, **and** other entities . . . consistent with obtaining the regulatory objectives.”

The Hazardous Material Transportation Act requires the Secretary of DOT to “maintain a central reporting system and information center capable of providing information and advice to law enforcement and firefighting personnel, other interested individuals, and officers and employees of the Government and State and local governments on meeting an emergency related to the transportation of hazardous material.” 49 U.S.C. §5121(d)(1)(B). The Act does not specify the information that must be maintained in the central reporting system, nor does it specify who should be required to do the reporting. Accordingly, there are no specific incident

reporting requirements that RSPA is *required* to impose. It follows that RSPA should impose incident reporting requirements that “impose the least burden on society, including individuals, businesses of differing sizes, and other entities . . . consistent with obtaining the regulatory objectives.” In particular, RSPA can and should reduce the incident reporting requirements imposed on the propane industry.

2. Incident Reporting Should Have Limited and Realistic Objectives.

RSPA is charged with the responsibility of evaluating the risks associated with the transportation of hazardous materials. In addition, the Secretary is periodically required to prepare “a statistical compilation of accidents and casualties related to the transportation of hazardous material.” 49 U.S.C. §5121(e)(1). While incident reporting can have some value for these purposes, it is important to recognize it has very significant limitations.

The propane industry operates an extremely large number of cargo tank motor vehicles from a very large number of (generally small) locations operated by a large number of marketers including many small businesses. As a result of these demographics, the weight of incident reporting obligations must be borne by a very large number of individuals, most of whom have at most infrequent exposure to RSPA’s incident reporting requirements. Accordingly, the potential for inconsistent responses to incident reporting requirements is extremely high. In this situation, a simple rule applies: the more complicated or qualitative the information to be reported, the less consistent the responses will be. This is a critical dynamic, because incident reporting data is useful only to the extent information is reported on a relatively consistent basis.

Given the variety of incidents that can occur and the variety of ways incidents can be described, categorized, or otherwise reported, Ferrellgas believes it is unrealistic to expect more than the most basic information from an incident reporting system. Experience with the current incident reporting system strongly supports this conclusion. In the course of the recent negotiated rulemaking addressing emergency discharge control, propane industry participants spent considerable effort reviewing the Form 5800 reports for propane unloading incidents. The reports were useful in identifying significant incidents by carrier and location, and in evaluating the gross magnitude of the consequences (in terms of deaths, injuries, and property damage) attributable to such incidents. However, it was discovered that little of the more detailed information in these reports was useful. Sometimes the reports provided preliminary information that proved, after subsequent investigation, to be incorrect. Sometimes the information provided was factually accurate but subject to misinterpretation. Often the information was too ambiguous to be useful. As a result, the reports were useful principally in identifying incidents that had occurred and in determining the gross magnitude of their consequences. To gain a reliable sense of what actually occurred and why, it was necessary gather additional information through individual follow-up. Ferrellgas attributes this to the inherent challenges involved rather than to shortcomings in the design of DOT’s reporting form. Based on the nature of the problems encountered, it is clear that more or different questions on the form would not have helped.

In view of the limitations inherent in incident reporting, Ferrellgas believes the incident reporting scheme should be aimed at limited, reasonably achievable objectives. Specifically, the

reporting scheme should be designed to serve an inventory function: to identify and broadly categorize significant transportation incidents. More elaborate reporting requirements intended to provide data for qualitative analysis serve only to increase regulatory burdens while generating data of increasingly dubious value. Analysis based on such data would be more dubious still.

3. Reduced and Simplified Incident Reporting Requirements for the Propane Industry Would Yield Better Data.

To date, the existing incident reporting requirements have failed to produce the basic inventory information that an incident reporting system could reasonably be expected to provide. This is partly attributable to the problem - now resolved - that only interstate carriers were required to report. But a substantial problem remains: the reporting requirements of 49 C.F.R. §171.16 are ambiguous and appear unrealistic as applied to the propane industry.

There has in fact been long-standing uncertainty, confusion, and frankly disbelief over the reporting obligations imposed under 49 C.F.R. §171.16. A rule that any unintentional release must be reported may seem to provide clear rules of engagement, but is problematical in several respects. One basic problem is that a requirement to report *any unintentional release* of product is difficult to interpret and apply. In order to develop reliable inventory **information**, the thousands of individuals who may be required to report must have a reasonably consistent understanding of *what* to report. There is currently no consistent understanding of what an “unintentional” release is, and RSPA guidance - while helpful - appears to leave considerable room for interpretation. See Letter from E. Mazzullo to D. Weiner (May 1, 1992). Nor is there a consistent understanding of what a “release” is (what, for example, is the point when normal loss through a pump seal graduates to the status of a reportable “release”?). Reasonable minds can and do differ on these issues; a major problem when there are literally thousands of minds involved.

The second problem is that the current rules could be construed to require incident reports for many situations that are viewed as non-events in the workaday world. It is unreasonable to expect that drivers will consistently report minor, inconsequential releases such as those that could occur, for example, due to the inadvertent opening of the hose-end valve on a bobtail hose. The problem is not one of unwillingness to comply; it is that the impulse to characterize minor releases as “incidents” and to report them as such does not come naturally and probably never will. After all, propane isn’t some highly toxic or radioactive material; it is a basic commodity - used in millions of homes - that presents hazards primarily as an ignitable mixture in air. Minor losses - while undesirable - are of no more moment than minor losses of gasoline between the gas can and the home lawnmower, and are likely to be viewed in this context. As a result, even individuals aware of the existence of incident reporting requirements may fail to consult them when minor, no-consequence releases of product occur. In many cases, the notion that such a release may be reportable may not occur to anyone; in other cases, it may be dismissed as implausible (“they can’t *really* want us to report this kind of thing; we must not be reading this right”). Regardless of the extent of education and outreach, it is unlikely that truly minor releases would ever be reported on a consistent basis. In any event, Ferrellgas does not believe

such releases *should* be reported. Reporting of such releases would only clutter DOT's incident reporting data with chaff.

To address these problems, clear and objectively reasonable rules of engagement are needed. Any obligation to report minor and inconsequential propane releases should be eliminated to ensure that reporting is focused on significant incidents rather than maintenance issues or other inconsequential losses that are likely to be overlooked. The criteria for reporting should also be as clear as possible to ensure a common understanding of incident reporting requirements. Ferrellgas believes that the objective criteria specified in 49 C.F.R. §171.15 generally provide appropriate rules of engagement for incident reporting in the propane industry, and should apply both with respect to telephonic reporting under 49 C.F.R. §171.15 and Form 5800 reporting under 49 C.F.R. §171.16. Any requirement to report events that do not meet these or similar criteria would create the "slippery slope" interpretational problems already discussed, sacrificing the integrity of the reported data for the sake of information concerning events that - at most - should be of very limited interest for purposes of safety regulation.

B. Reductions in Incident Reporting Burdens are Particularly Appropriate for Propane.

Relative to most other hazardous materials, propane involves a disproportionately large regulated community including many comparatively unsophisticated small businesses. At the same time, the threats associated with propane are limited (due to the absence of toxicity or environmental contamination concerns) relative to many other hazardous materials. Accordingly, reductions in incident reporting burdens should be easier to justify - and should provide disproportionately greater burden reduction - in the case of propane than in the case of most other hazardous materials.

C. RSPA Should Convene Meetings to Discuss Incident Reporting Issues

Ferrellgas is proud to have participated in RSPA's recently-concluded negotiated rulemaking concerning cargo tank emergency discharge control, and believes that the dialogue developed in that process was extremely valuable. Whether or not incident reporting issues warrant a full-fledged negotiated rulemaking, Ferrellgas urges RSPA to engage in the same kind of open and constructive discussion that proved so useful in the negotiated rulemaking context. Such an approach would be responsive to the directive of Executive Order 12866, and Ferrellgas would be pleased to participate.

Response to Questions

1. It would be counter-productive to expand incident reporting requirements to persons other than carriers. With the carrier and carrier alone obligated to report, the rules for engagement are clear. Nothing but confusion would result if the reporting obligation is extended to other parties. Duplicate and conflicting reports would become commonplace, and confusion causing failures to report would undoubtedly occur.

3. The \$50,000 reporting threshold for incident reporting is reasonable, but should be adjusted regularly for inflation. The reported data will inevitably be used by RSPA and others to analyze long-term trends, and should therefore reflect actual incident trends rather than the march of inflation.

5. At least in the case of propane, the existing criteria for immediate telephonic notification adequately capture the circumstances in which immediate reporting may be warranted. Accordingly, it would be inappropriate to expand the circumstances in which immediate telephonic notification is required.

6. Requirements for communication between or among private parties involved in transportation arrangements are appropriately addressed through contractual arrangements between those parties, and are neither a necessary nor appropriate subject for federal regulation,

7. As already discussed in response to Question 1, only carriers should be subject to incident reporting requirements.

8. The current regulatory language is not sufficiently clear as to when a written report is required. As already discussed in Section A.3. of these comments, the current regulatory language presents difficult interpretational issues. In addition, the structure of the provision is inordinately complex.

9. Reporting should not be expanded to cover incidents that do not involve unintentional releases of hazardous materials. RSPA doesn't need more data, it needs *more reliable relevant* data. This can and should be obtained by increasing the focus on significant incidents and eliminating any need to report minor incidents or non-incidents. In particular, Ferrellgas believes that a requirement to report no-release incidents would substantially increase reporting burdens without providing any appreciable benefits. The existing requirements present more than enough interpretational difficulty without raising questions as to the definition of a "collision" or a "departure from the roadway." Ferrellgas does not understand the relevance of fender-benders and other no-release traffic incidents in the regulation of hazardous materials transportation.

10. As already discussed, Ferrellgas believes the reporting criteria for written reporting should, in the case of propane, be the same as the criteria for telephonic reporting. Accordingly, RSPA should expand the Section 171.16(c) exemptions to include propane.

12. Ferrellgas believes that reporting requirements should be simplified for all incidents required to be reported, and that minor propane releases should not be required to be reported at all.

13. As already discussed in Section A.2. of these comments, it may be reasonable to expect incident reporting that categorizes the general nature of releases, but not to capture sufficiently detailed and reliable information to evaluate causal factors. Ferrellgas believes that an effort to capture such data through the incident reporting system would almost inevitably generate bad (*i.e.*, inaccurate and misleading) data.

19. Precise information on the location of an incident should not be required. It is often difficult to obtain such information in rural settings, and the reporting of such information would provide no substantial benefit.

21. Supplemental reporting should not be required. Review of incident reports during the recent cargo tank regulatory negotiation indicated that the core data necessary to identify significant incidents and determine the gross magnitude of the consequences associated with them proved reasonably reliable. While there were considerable problems with the reliability and usefulness of the other data provided on incident report forms, these problems generally relate to the inherent challenges involved in efforts to elicit accurate, unambiguous, yet detailed factual information from large numbers of disparate responders. There would thus be little utility in any requirement for supplemental reporting, and the burdens associated with any such requirement would be too great to justify.

22. Information on the duration of a release is typically difficult to reconstruct. Efforts to collect such information can be expected to elicit more speculation and guesswork than reliable information.

26. It would be useful to distinguish between employees, emergency response personnel, and members of the public in the reporting of casualties. However, the requirement to report hospitalization should be clarified both to reflect current RSPA guidance stating that emergency room treatment or evaluation does not constitute “hospitalization” for reporting purposes,” and to specify further that only hospitalization that is necessary for actual treatment of injuries (as opposed to observation) counts as “hospitalization” for this purpose.

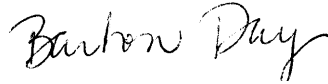
34. As already discussed in response to Question 6, communication obligations between private parties should be a matter between the private parties, and is not an appropriate subject for federal regulation.

35. As already discussed in response to Question 9, Ferrellgas strongly opposes any requirement to report “accidents” (however defined) in which no release of hazardous materials is involved.

^{1/} Letter from E. Mazzullo to D. Weiner.

Ferrellgas appreciates the opportunity to provide comment on these issues, urges RSPA to convene meetings to discuss them further. Ferrellgas believes that discussion of the purposes to be served by incident reporting and the potential usefulness of the information to be reported would be particularly constructive.

Respectfully Submitted,

A handwritten signature in black ink that reads "Barton Day". The signature is written in a cursive, flowing style.

Barton Day
Counsel for Ferrellgas